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# CONTRACT MODIFICATION AND "SELF-HELP SPECIFIC PERFORMANCE": A REACTION TO PROFESSOR NARASIMHAN

Robert A. Hillman†

Professor Subha Narasimhan's provocative recent article points out the similarities between a contracting party avoiding the enforcement of a contract modification after the other party performs and obtaining specific performance of the original contract.<sup>1</sup> Suppose, for example, that a seller of goods, without stating a reason, insists on a price increase before performing an agreement. The buyer, who needs the goods, agrees; the seller delivers the goods, but the buyer then refuses to pay more than the original price. If the seller is unable to enforce the modification, the buyer obtains the goods and pays only the initial price. Because the buyer achieves performance of the original agreement in this way, Professor Narasimhan calls the buyer's efforts "self-help specific performance."<sup>2</sup>

Professor Narasimhan sees a potential problem with this result. She reasons that remedies for breach of contract typically do not include specific performance and that a contract promisee therefore does not usually pay for that potential remedy in the contract price.<sup>3</sup> The buyer in our example might therefore gain a windfall by agreeing to the modification and later successfully contesting it, instead of seeking damages for the seller's refusal to perform the original contract. The buyer might secure the seller's actual performance without paying for the specific performance remedy.<sup>4</sup>

Professor Narasimhan worries that current law restricts specific performance and liberally overturns contract modifications and thereby encourages buyer "opportunism" via self-help specific per-

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† Professor of Law, Cornell University. I thank Ted Eisenberg, Jon Macey, Dale Oesterle, Stewart Schwab, and Robert Summers for their helpful suggestions. Sarah Gelb provided excellent research assistance.

<sup>1</sup> Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987).

<sup>2</sup> *Id.* at 62.

<sup>3</sup> *Id.* at 83 n.111 and accompanying text. *But see infra* notes 73-82 and accompanying text.

<sup>4</sup> *Id.* at 63. Professor Narasimhan would permit buyer self-help specific performance, however, when the buyer is entitled to specific performance but the remedy is not "practical" to the buyer, for example, because of the delay in obtaining it. *Id.* at 82, 84-86. Such a buyer cannot improve its position via self-help specific performance.

formance in our example.<sup>5</sup> She therefore bemoans theorists' and courts' one-sided focus on potential misconduct by the seller. In fact, she seeks to discount the problem of the seller's refusal to perform without a modification by characterizing the seller's duty under the contract as nothing more than a choice to perform or to breach and pay damages.<sup>6</sup> She also insists that current modification law cannot combat seller bad faith in any event, and may actually deter sellers from entering beneficial modifications.<sup>7</sup> For these reasons, Professor Narasimhan proposes a "bright-line" rule that would preclude a buyer from contesting a modification except when the buyer could have obtained specific performance of the original contract or when specific performance was the "theoretically superior" remedy but was unavailable for discretionary reasons.<sup>8</sup> Under her approach, then, a modification might be enforceable even when current law would hold that a seller wrongfully extorted it.

My views differ significantly on many of the issues raised by Professor Narasimhan's interesting article. In Part I, I argue that a buyer, confronted by a seller's demand for a modification, will encounter significant difficulties attempting to predict whether the law would grant specific performance, to evaluate the likelihood of defeating a contract modification, and to measure the other costs and benefits of the self-help strategy. In addition, if the buyer were able to penetrate the doctrine, the buyer would learn that courts increasingly grant specific performance and enforce most contract modifications. Contract law therefore actually disfavors buyer opportunism through self-help specific performance. I also assert in Part I that current law adequately polices buyer opportunism in the unlikely event that it should come to pass.

In Part II, I assert that we should not be concerned even if current law permitted buyers to achieve self-help specific performance when that law would deny court-ordered specific performance. In developing Part II's argument, I dispute Professor Narasimhan's view that a seller has a "right" to breach and pay damages and that a

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<sup>5</sup> Professor Narasimhan does not confine her analysis to buyers, nor, for that matter, to the sales context. For purposes of simplicity and clarity, I will pursue the analysis within these contexts, but I believe my concerns apply generally. For my reaction to her thesis in other contexts, see *infra* notes 49 and 116.

<sup>6</sup> Narasimhan, *supra* note 1, at 65, 79, 81-82 n.105. In certain contexts, however, she does view the potential bad faith of the party seeking a modification as greater than that of the other party. See, e.g., *id.* at 93 (potential exploitation by an employee's threat to breach is "usually much greater" than that provided by the employer's self-help remedy).

<sup>7</sup> *Id.* at 80-81.

<sup>8</sup> *Id.* at 84, 95. An example of the latter case for self-help specific performance is when goods are unique but the contract is long-term, so that a court would have difficulty monitoring and policing performance. *Id.* at 88. See *infra* note 49.

buyer can gain a windfall via self-help specific performance. Professor Narasimhan's approach, I contend, deflects the analysis from far more important issues involving misconduct by the seller.

In Part III, I rebut Professor Narasimhan's claim that today's modification law cannot help deter misconduct by a seller and will only dissuade sellers from agreeing to a modification. I also contest her assertion that when confronted with seller bad faith,<sup>9</sup> a buyer's options should be tied to contract law's current approach to contract remedies even if those remedies are found wanting.<sup>10</sup>

## I

### THE POTENTIAL FOR BUYER OPPORTUNISM THROUGH SELF-HELP SPECIFIC PERFORMANCE

Professor Narasimhan apparently would not require a finding of buyer bad faith in order to preclude self-help specific performance. Instead, she seeks an "easily applied, bright-line rule"<sup>11</sup> diminishing the *possibility* that a buyer could improve its position by contesting a modification and thereby curtailing the buyer's *potential* for opportunistic behavior.<sup>12</sup> If it is unlikely that a buyer would attempt to engage in strategic behavior through self-help specific performance under current law, however, there is little need for her rule.<sup>13</sup> In this part I seek to show that a buyer would rarely adopt a strategy of self-help specific performance because of the uncertainty and, ultimately, likely failure of the ploy.

Let us analyze Professor Narasimhan's own example:

Buyer-promisee (B) has a contract for the supply of electrical parts with Seller-promisor (S). B intends to use the parts to assemble a system that she is under contract to supply to her own customer (C). The contract between B and C provides for fines if B does not meet the delivery date. Moreover, C is B's major customer and will continue his relationship with B only as long as B continues to be reliable. Before the delivery date set in B's contract with S, S informs B that he will be unable to fulfill his contract unless B agrees to an increase in price. B checks other suppliers: They are committed to contracts of their own, but will

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<sup>9</sup> The problem of self-help specific performance arises only when a seller acts in bad faith. Otherwise the modification would be enforceable and the buyer would be precluded from self-help. See *infra* notes 50-51 and accompanying text.

<sup>10</sup> Narasimhan, *supra* note 1, at 63, 80-81. See *infra* notes 104-12 and accompanying text.

<sup>11</sup> *Id.* at 95.

<sup>12</sup> For example, Professor Narasimhan worries about a buyer's "potential for exploitation" through self-help specific performance, *id.* at 61-62, about a buyer's "incentives" to modify and later contest because the buyer may be better off by doing so, *id.* at 63, and about a buyer's potential for circumventing remedial limits. *Id.* at 64.

<sup>13</sup> See *infra* notes 14-47 and accompanying text.

be able to supply B at a price between the contract price and the suggested modified price, but at a later date than that set in B's contract with S. The delay will cause B to miss her delivery date with C, but B can eventually deliver the system. In addition, S is B's usual supplier of electrical parts. B has not dealt with any of the other suppliers before; while their reputations are good, B has no firsthand knowledge about the reliability of their parts and their compatibility with B's own product.<sup>14</sup>

Professor Narasimhan asserts that B could not obtain specific performance under current law but could overturn a price modification after S delivers,<sup>15</sup> thereby creating the conditions for buyer opportunism. However, contract law actually disfavors B's opportunism through self-help specific performance even on these carefully crafted facts.

Despite Professor Narasimhan's conclusion that B "almost certainly" would not receive the remedy, B enjoys a significant potential for court-ordered specific performance.<sup>16</sup> Uniform Commercial Code section 2-716 provides for specific performance "where the goods are unique or in other proper circumstances."<sup>17</sup> B cannot obtain the goods when it needs them for assembling a system for its own "major" customer. As a result, B may lose that customer and sustain liability for liquidated damages.<sup>18</sup> Courts have already applied the "other proper circumstances" test of section 2-716 to analogous circumstances, making specific performance more likely than Professor Narasimhan admits.<sup>19</sup>

Professor Narasimhan reasons, however, that "[b]ecause substitute parts were probably available on the market before the completion of litigation," B could not show that damages are

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<sup>14</sup> Narasimhan, *supra* note 1, at 67. The problem is loosely based on *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

<sup>15</sup> Narasimhan, *supra* note 1, at 76-77.

<sup>16</sup> *Id.* at 77. If a court would grant specific performance, a buyer cannot improve its position via self-help specific performance.

<sup>17</sup> U.C.C. § 2-716(1) (1987) [hereinafter U.C.C. or Code].

<sup>18</sup> "Since B will be late under her delivery contract with C, she will be liable for the contractual fine and might also lose C's good will and chances to enter into future contracts." Narasimhan, *supra* note 1, at 67-68.

<sup>19</sup> See *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Proyectos Electronicos, S.A. v. Alper*, 37 Bankr. 931 (E.D. Pa. 1983); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923 (N.D. Cal. 1970); *Sedmak v. Charlie's Chevrolet, Inc.*, 622 S.W.2d 694 (Mo. Ct. App. 1981); *Stephan's Mach. & Tool, Inc. v. D & H Mach. Consultants, Inc.*, 65 Ohio App. 2d 197, 417 N.E.2d 579 (1979); *Ace Equip. Co. v. Aqua Chem, Inc.*, 73 Pa. D. & C.2d 300 (1975). In fact, Professor Narasimhan points out that because B uses the parts to manufacture its own product, its "major loss" is likely to be lost opportunities. Narasimhan, *supra* note 1, at 77 n.84. Specific performance may therefore be necessary because damages are too uncertain.

"inadequate."<sup>20</sup> But Professor Narasimhan ignores B's prospect of obtaining a preliminary mandatory injunction to compel S's performance before the goods become available on the market.<sup>21</sup> In addition, because of uncertainty concerning the compatibility and reliability of replacement parts, a court may decree specific performance even if parts were available at the time of litigation.<sup>22</sup> At minimum, the outcome of a specific performance action is uncertain under Professor Narasimhan's facts, thereby imperiling B's self-help specific performance strategy.

Not only will it be unclear at the time of modification whether B can obtain specific performance, B must also predict whether she can successfully upset a modification once made.<sup>23</sup> The test of enforceability of a modification focuses on S's good faith.<sup>24</sup> Considerable ink has been spilled demonstrating the complexity of the good faith test in the modification context.<sup>25</sup> Between merchants, good faith requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."<sup>26</sup> An appropriate investigation of this combined subjective and objective test requires B to evaluate the magnitude of the increase sought, the reasons S desires an increase, which may depend on complex market or other data in S's control, the flexibility of S's negotiating stance, and the availability of market substitutes or other reasonable alternatives.<sup>27</sup> Because of the complexities of the good faith test,

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<sup>20</sup> Narasimhan, *supra* note 1, at 69; *see also id.* at 77: "[T]he contention that a delay of a few weeks is sufficient to allow a finding of market scarcity is probably implausible; courts have been quite reluctant to broaden the ambit of specific performance to market goods."

<sup>21</sup> *See, e.g., Eastern Air Lines*, 415 F. Supp. 429; *Kaiser Trading Co.*, 321 F. Supp. 923; *see also Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172 (D. Kan. 1988).

In addition, if the sole reason B cannot get specific performance is the delay in the courts, should we be upset if B achieves self-help specific performance and avoids (and does not contribute to) court delay? *See infra* note 112 and accompanying text.

<sup>22</sup> Professor Narasimhan agrees that if the parts are "highly specialized" specific performance may be in order. Narasimhan, *supra* note 1, at 84; *see also id.* at 77. But she fails to see that the issue of whether the parts pass this test will challenge both courts and B. She also states without authority that B's preference to deal with S is insufficient for specific performance "since B is relying on relational elements to argue that an otherwise fungible product is in fact unique." *Id.* at 69 n.39.

<sup>23</sup> Professor Narasimhan readily acknowledges the costs of uncertainty concerning whether a modification is enforceable, *id.* at 70, but apparently concludes that the test of enforceability is sufficiently clear so that these costs are not debilitating. *Id.* at 73-77.

<sup>24</sup> *See* U.C.C. § 2-209 and comment 2; Robert A. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979).

<sup>25</sup> *See* Hillman, *supra* note 24.

<sup>26</sup> U.C.C. § 2-103(1)(b).

<sup>27</sup> Hillman, *supra* note 24, at 880-901. Professor Narasimhan agrees that the good faith standard "complicate[s]" the modification inquiry, but concludes that the test facil-

courts often ignore it or appear to employ it incorrectly.<sup>28</sup> There is little reason to suspect that B would do otherwise.

At any rate, to the extent that B can confidently sort out the various elements of good faith and predict the likelihood of overturning a modification, B would learn, contrary to the picture painted by Professor Narasimhan,<sup>29</sup> that defeating the modification is improbable. Under the good faith test, according to Professor Narasimhan, S must demonstrate that he had a "legitimate commercial reason" for seeking a modification and that the modification's price was fair.<sup>30</sup> S's failure to prove either of these points defeats the modification.<sup>31</sup> But overturning a modification may be much more difficult than Professor Narasimhan admits. For one thing, courts would not necessarily assign to S the burdens of production and persuasion on the issues of his reasons for seeking a modification and the fairness of the modification.<sup>32</sup> For another, a court

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itates defeating modifications. Narasimhan, *supra* note 1, at 73-74. *But see infra* notes 29-37 and accompanying text.

<sup>28</sup> Hillman, *supra* note 24, at 862-76.

<sup>29</sup> Professor Narasimhan states that "B will often be able to contest a modification successfully where she could not obtain specific performance." Narasimhan, *supra* note 1, at 70. She also insists that "the standards for challenging the enforceability of a modification . . . are much easier to satisfy than . . . those which govern the availability of specific performance, both in terms of substantive criteria and burden of proof." *Id.* at 73. In addition, she asserts that "[i]n the typical situation, B will discover that her ability to contest the modification is much greater than her ability to prevail in a suit for specific performance." *Id.* at 76. These assertions are necessary to demonstrate that buyer self-help specific performance is a real problem.

<sup>30</sup> *Id.* at 74.

<sup>31</sup> *Id.*

<sup>32</sup> Professor Narasimhan asserts that "courts and commentators usually assume that . . . the party attempting to enforce a modification . . . has the burden of proof as to the contract's enforceability." *Id.* Even this issue is unsettled. Although *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), appears to require the seller to demonstrate a reasonable and honest basis for seeking a modification, the court fails to distinguish between burdens of production and persuasion and to clarify what quantum of evidence is required to satisfy the appropriate burden. *See generally* Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems In—And Solutions For—The Uniform Commercial Code*, 1984 DUKE L.J. 92. In addition, comment 2 to U.C.C. section 2-209 is a slender reed upon which to conclude that the seller has the burdens: the test of good faith "may in some situations require an objectively demonstrable reason for seeking a modification." Allen & Hillman, *supra*, at 113 (emphasis added).

Moreover, there is little reason to believe that good faith commands a significantly different approach than a test based on the principle of economic duress: "It seems likely that where contract modification is at issue, the law of 'duress' and the law of 'good faith' will tend to merge, as Courts focus on the issue of coercion as the principal basis for resisting modification-enforcement." CHARLES A. KNAPP & NATHAN M. CRYS-TAL, *PROBLEMS IN CONTRACT LAW* 671 (2d ed. 1987). When courts focus on duress, they often appear to place the burdens on the party seeking to overturn the modification. *See, e.g., Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285 (8th Cir. 1977) (party claiming duress must show lack of other alternatives and wrongful coercive acts of the other party); *Oskey Gasoline & Oil Co. v. Continental Oil Co.*, 534 F.2d 1281, 1286 (8th Cir. 1976) ("The assertion of duress must be proven by evidence that the duress

would rarely defeat a modification on the basis of S's bad faith in the absence of an additional showing that B had no reasonable alternative but to accept S's modification proposal. The implication that S's motive was to extract additional gain at B's expense is simply not persuasive if B had reasonable alternatives.<sup>33</sup> As a result, any court that would deny specific performance because substitute goods would soon be available, would also likely enforce a price modification on the theory that the substitute goods presented B with a reasonable alternative to the modification.

Even if Professor Narasimhan were correct that S has the burdens of production and persuasion on the issues of S's motives and the fairness of the modification, and that failing to meet either of them would be sufficient to defeat the modification, these burdens may not be difficult for S to satisfy. Apparently comforted by general business norms of flexibility and cooperation,<sup>34</sup> and by the reality that adjustment of agreements is therefore common, courts rarely look with suspicion on the modification of a sales agreement.<sup>35</sup> Instead, courts view a party's attempt to overturn an obliga-

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resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities.") (citation omitted); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (buyer had the burden of demonstrating that it could not obtain specialized parts elsewhere). See also *Palmer Barge Line, Inc. v. Southern Petroleum Trading Co.*, 776 F.2d 502 (5th Cir. 1985).

<sup>33</sup> See *United States ex rel. Crane Co. v. Progressive Enters., Inc.*, 418 F. Supp. 662 (E.D. Va. 1976) (buyer, alleging the seller's bad faith, argued that seller was the only supplier of the precise machine required to fulfill a government contract); see also RESTATEMENT (SECOND) OF CONTRACTS § 175; Hillman, *supra* note 24, at 890-93. Professor Narasimhan appears to concede the point: "A promisee must, at most, demonstrate that she had no reasonable alternatives to self-help specific performance." Narasimhan, *supra* note 1, at 81 n.104.

<sup>34</sup> See Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. Rev. 565, 569 (discussing the work of Macaulay and Macneil); see also *infra* notes 74-78 and accompanying text. Professor Narasimhan concedes that most adjustments of "long-term" contracts are enforceable and therefore avoid the "problem" of self-help specific performance. See Narasimhan, *supra* note 1, at 71 n.49. But even relatively short-term agreements may reflect the attributes mentioned in the text. See Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483, 485-91.

<sup>35</sup> See *American Exploration Co. v. Columbia Gas Transmission Corp.*, 40 U.C.C. Rep. Serv. (Callaghan) 1647, 1657, 1659 (S.D. Ohio 1985), *aff'd*, 779 F.2d 310 (6th Cir. 1985) (party's right to modify "very broad"; modification upheld even though the court found that the equities favored the party contesting the modification and found that the other party's conduct was "heavy handed"); *Oskey Gasoline & Oil Co.*, 534 F.2d 1281 (modification upheld where buyer had alternative source and a breach of contract claim); *Pirrone v. Monarch Wine Co. of Ga.*, 497 F.2d 25 (5th Cir. 1974) (modification favorable to buyer upheld despite seller's financial distress and clogged facilities resulting from buyer's failure to order brandy pursuant to a contract); *United States ex rel. Crane Co.*, 418 F. Supp. 662 (increase in the cost of materials to seller justified its request for a modification; buyer wrongly failed to protest the modification and never intended to pay the higher price); *Farmland Serv. Coop., Inc. v. Jack*, 196 Neb. 263, 242 N.W.2d 624 (1976) (sellers refused to deliver under unfavorable conditions; modification upheld



tion already made, even an adjusted one, with distrust.<sup>36</sup> Legitimate reasons for seeking a modification and the fairness of the new price therefore may not be difficult to prove.<sup>37</sup> In addition, S and B's relation ("S is B's usual supplier") would tend to substantiate the conclusion that the parties intended to cooperate and adjust their agreement from time to time.

In extreme cases, of course, a court will overturn a modification. Assume a one-time deal lacking the usual supporting norms of flexibility and cooperation. Aware of sudden and unexpected market scarcity and the buyer's heavy investments in the contract, the seller refuses to perform without a large increase in the price and without the buyer's consent to other onerous contracts. An action for damages by the buyer would entail delay, additional costs, and potential undercompensation.<sup>38</sup> The seller offers no commercially reasonable explanation for declining to perform without the modification.<sup>39</sup>

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as settlement of a good faith dispute); *Ruble Forest Prods., Inc. v. Lancer Mobile Homes of Or., Inc.*, 269 Or. 315, 524 P.2d 1204 (1974) (modification upheld although the court suggested that it might be "inclined to believe" the testimony offered by the party opposing the modification).

Commentators often cite *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971), as the paradigm case for a finding of duress. There, a contractor recovered payments made under duress when the subcontractor refused to deliver specialized parts without a substantial increase in the price and without the contractor's consent to a second subcontract; the contractor needed the parts to satisfy its contract with the Navy and to avoid substantial liquidated damages liability and to avoid losing future contracts. Even in this case, the trial court and appellate division held that there was no duress, and only four out of seven judges on the New York Court of Appeals voted to reverse. See also *Hillman*, *supra* note 24, at 873-75.

<sup>36</sup> See, e.g., *Pirrone*, 497 F.2d at 29 (upsetting a modification because of a previous breach of contract and because of hardship on the injured party would work havoc on "desirable settlements of disputed claims"); *United States ex rel. Crane Co.*, 418 F. Supp. at 664 (the buyer's "secret intention . . . never to pay the higher price . . . is hardly in keeping with the good faith requirement of the UCC of honesty in fact."). See also *Oskey Gasoline & Oil Co.*, 534 F.2d at 1286; *infra* notes 44-46 and accompanying text.

<sup>37</sup> With respect to the reasons for seeking a modification, basically S must show a change in conditions; S need not show that the contract is a losing one nor that the circumstances present S with grounds to avoid the contract. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 146 n.25 (6th Cir. 1983) (desire to avoid loss not the only permissible reason for seeking a modification). Even diminished profits should be sufficient grounds for seeking a modification.

Despite the law's current approach described in the text, I propose below that courts *should* police modifications with renewed vigor so that B probably should be able to overturn the modification in Professor Narasimhan's example. See *infra* notes 53-56, 72, 83, 109, 112 and accompanying text.

<sup>38</sup> Professor Narasimhan describes in great detail some of the potential non-compensable losses of a buyer. For example, she posits that a buyer might have trained its employees to use the seller's product. Narasimhan, *supra* note 1, at 66 n.26. She also discusses, *inter alia*, the difficulties of recovering consequential damages, such as foreseeability and certainty. *Id.* at 66.

<sup>39</sup> See *supra* notes 30-37 and accompanying text.

In precisely such situations, however—when a buyer is unable to cover and is heavily dependent on performance—the likelihood of obtaining court-ordered specific performance also dramatically increases.<sup>40</sup> In fact, specific performance is especially likely when the court is skeptical of the seller's conduct. Because specific performance is an equitable remedy, if a court suspects that the seller refused to perform simply to extort a higher price, the court will be more inclined to award specific performance.<sup>41</sup> Of course, if courts generally grant specific performance in the drastic cases where a buyer can overturn a modification, the buyer "can never receive *more* than her contractual rights" and buyer opportunism is foiled.<sup>42</sup>

In addition to overall uncertainty concerning the legal tests of specific performance and good faith modification, a buyer considering a self-help specific performance option, such as B in Professor Narasimhan's example, must also compare the likely out-of-pocket and other costs of seeking specific performance and attempting to upset a modification. As Professor Narasimhan ably demonstrates, these costs, which include the costs of litigation, delay, and loss of goodwill are numerous, complex and contingent.<sup>43</sup>

Notwithstanding the severe limitations on a buyer's self-help specific performance strategy, Professor Narasimhan decries the Code's failure to "*explicitly incorporate any notion of promisee [buyer] opportunism in its standards for the enforceability of modifications.*"<sup>44</sup> But Professor Narasimhan acknowledges that courts apply the Code's general duty of good faith directly to buyers.<sup>45</sup> These courts have had little difficulty focusing on whether a buyer sought to mislead the seller and, if so, whether self-help specific performance merits

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<sup>40</sup> In fact, in general, courts may be warming to the Code's section 2-716 "other proper circumstances" test. See, e.g., cases cited *supra* note 19. But see Narasimhan, *supra* note 1, at 72 (few instances of specific performance, especially in commercial settings).

<sup>41</sup> See, e.g., *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975) (specific performance appropriate where supplier cancelled the contract after the purchaser objected to an increase in price); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975) (specific performance granted where seller demanded a price increase or threatened to shut off buyer's supply of jet fuel within 15 days).

<sup>42</sup> Narasimhan, *supra* note 1, at 85.

<sup>43</sup> See *id.* at 67-70. Although she considers the potential for a "sour[ed]" relation as one cost of self-help specific performance, an additional cost is damage to reputation. Few may want to deal with a party who has the reputation of reneging on modifications, especially in a typical environment of flexibility and cooperation.

<sup>44</sup> *Id.* at 74-75 (emphasis added). Professor Narasimhan also asserts that "[c]ommentators on modification . . . interpret 'duress' standards from the perspective that only the party seeking the modification need justify her actions." *Id.* at 94-95. But my own study of modification law under the U.C.C. proposed an analysis of the other party's overall position, including whether that party tricked the party seeking the modification into performing. Hillman, *supra* note 24, at 898-99.

<sup>45</sup> Narasimhan, *supra* note 1, at 74 n.70. See, e.g., *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979).

the courts' approbation.<sup>46</sup> The Code's general good faith obligation therefore also serves to discourage buyer opportunism.

In summation, because a buyer will rarely have sufficient information to concoct a strategy of self-help specific performance, because defeating a modification is improbable, because court-ordered specific performance is probably obtainable when a buyer *can* modify and contest, and because law is in place to police buyer opportunism, current law likely deters buyer opportunism, rather than invites it.<sup>47</sup> Buyer opportunism via self-help specific performance therefore may be so rare as to be no problem at all.

## II

### BUYER AND SELLER OPPORTUNISM: A COMPARISON

In Part I, I asserted that buyer opportunism is not a significant problem. Suppose, for the sake of argument, that Professor Narasimhan is correct—that under certain conditions current modification law enables a buyer, disentitled to specific performance, to trick a balking seller into performing by agreeing to a modification and later successfully contesting it. The question then becomes: Should we be troubled by this result? Should we create new law to change it? I believe the answer to both questions is no.<sup>48</sup> In this

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<sup>46</sup> See, e.g., *Oskey Gasoline & Oil Co. v. Continental Oil Co.*, 534 F.2d 1281, 1286 (8th Cir. 1976); *Pirrone v. Monarch Wine Co. of Ga.*, 497 F.2d 25 (5th Cir. 1974); *United States ex rel. Crane Co. v. Progressive Enters., Inc.*, 418 F. Supp. 662 (E.D. Va. 1976); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971). But Professor Narasimhan asserts that the standard of buyer good faith should reflect available remedies. Narasimhan, *supra* note 1, at 74 n.70; see also *id.* at 63 n.10. Whether modification law should be tied to remedial law in this way is discussed *infra* in Parts II and III.

<sup>47</sup> Professor Narasimhan cites three cases for the proposition that modification doctrine provides a self-help specific performance remedy: *T & S Brass & Bronze Works v. Pic-Air, Inc.*, 790 F.2d 1098 (4th Cir. 1986); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983); and *Pirrone*, 497 F.2d 25. See Narasimhan, *supra* note 1, at 65 n.15. None of these cases suggests that self-help is an important problem. In *Roth Steel*, the court failed to enforce the modification only because the court believed that the seller was dishonest in not offering its theory that it had the right to raise prices until the trial. 705 F.2d at 148. The court took great pains to show that the seller *had* reasonable grounds for seeking a modification. Thus, the court's overturning the modification (required for buyer self-help) was unusual.

In *Pirrone*, the court *upheld* the modification and stated that breach by the party asserting a modification and hardship to the other party do not bring into play a claim of duress, because such law would work havoc on "desirable settlement of disputed claims." 497 F.2d at 29.

In *T & S Brass*, the court specifically repudiated the notion that a buyer's conduct must be scrutinized when the seller, in bad faith, coerces the buyer. 790 F.2d at 1105. See *infra* Part II.

<sup>48</sup> But see Narasimhan, *supra* note 1, at 76: "Commentators . . . would allow the promisee [the buyer] to successfully contest the modification *even if she would gain more by modifying and contesting than from a suit to enforce the original contract.*" (emphasis in original).

part, I compare seller and buyer conduct under both Professor Narasimhan's and my characterization of today's modification law. I conclude that seller opportunism is a much more serious problem under either portrayal of the law.<sup>49</sup> In fact, I question whether we should label the buyer's strategy improper at all.

To achieve self-help specific performance, the buyer must be able to overturn the modification. Under my interpretation of today's modification law, this requires a showing of grievous seller misconduct.<sup>50</sup> But even under Professor Narasimhan's view of existing law, defeating a modification requires at least worrisome seller behavior: A seller threatens to breach without a modification, but cannot muster a "legitimate commercial reason" for seeking one or cannot demonstrate that the modification reflects a fair price.<sup>51</sup>

Professor Narasimhan contends, however, that a buyer, threatened by the seller's breach, has the "option" to bring an action for the breach or to pursue self-help specific performance.<sup>52</sup> But the buyer's "choice" may be illusory.<sup>53</sup> Consider Professor Narasimhan's own example: Confronted by the loss of its own major customer and other unrecompensed damages if she "chooses" to bring an action against S, does B have any option but to agree to pay more for S's goods and hope to show later that a gun was to her head?<sup>54</sup> Even if one insists that B's choice is real in the sense that

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<sup>49</sup> Professor Narasimhan concedes the point, at least in some contexts. She urges self-help specific performance when a supply contract is long-term and "the quality of the parts is critical," despite the unavailability, for administrative reasons, of court-ordered specific performance. *Id.* at 88. She argues that the seller's ability to exploit is extreme and the gains to the buyer through self-help likely exceed the costs to the seller. In addition, in relation to the analogous issue of whether an employer should be able to achieve self-help specific performance when an employee threatens breach, she states: "[T]he potential for exploitation inherent in a threat to withdraw an irreplaceable service in midstream is usually much greater than that reflected in the differing valuations of the two remedies that would have affected the original contract price." *Id.* at 93.

But I believe Professor Narasimhan's point is far more generalizable than she is apparently willing to admit. For example, in Professor Narasimhan's sales problem, why is S's potential for exploitation any less than the above examples when B's failure to receive fungible parts in time to assemble C's system will cost B future contracts with B's "major customer," C? *But see id.* at 88 n.130.

<sup>50</sup> *See supra* notes 38-39 and accompanying text.

<sup>51</sup> *See supra* notes 30-31 and accompanying text.

<sup>52</sup> Narasimhan, *supra* note 1, at 65.

<sup>53</sup> "[The buyer] actually had no choice, when the prices were raised by [the seller], except to take the gears at the 'coerced' prices and then sue to get the excess back." *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 133, 272 N.E.2d 533, 537, 324 N.Y.S.2d 22, 28 (1971).

<sup>54</sup> *See, e.g., id.*, 272 N.E.2d at 537, 324 N.Y.S.2d at 28 ("Considering [the seller's wrongful] conduct in the past [the buyer's failure to contest earlier] was perfectly reasonable, as the possibility of an application by [the seller] of further business compulsion still existed until all of the parts were delivered."). *See also* *Pirrone v. Monarch Wine*

she can modify and contest *or* face the unpleasant alternative,<sup>55</sup> S's threat to breach and B's lack of reasonable options *justify* B's decision to pursue self help.<sup>56</sup>

Professor Narasimhan mounts various attacks against this "traditional" modification analysis. She asserts that the self-help specific performance remedy is an "equivalent weapon" to the seller's use of the inadequacy of contract remedies to achieve a modification.<sup>57</sup> To convince, Professor Narasimhan must sanitize the seller's conduct and castigate the buyer's. She observes that contract damages are "compensatory" not punitive, and reasons that contract remedies do not induce performance.<sup>58</sup> From this, she reasons that a promissory obligation consists of a choice to perform or to pay damages.<sup>59</sup> In addition, because the parties know or should know the nature of contract remedies at the time of contracting, the seller's decision to breach and pay damages cannot be immoral.<sup>60</sup> Accordingly, the buyer's self-help specific performance remedy robs the seller of its rightful breach option and, because the buyer has not paid for the remedy of specific performance, unjustly enriches the buyer.<sup>61</sup>

But Professor Narasimhan's arguments do not persuade. Contract law, taken as a whole, does not authorize a breach option, notwithstanding remedial law's preference for damages.<sup>62</sup> The reasons for this preference are complex.<sup>63</sup> For example, it may derive from nothing more than ancient "turf" battles. In order to reassure

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Co. of Ga., 497 F.2d 25 (5th Cir. 1974), discussed in Hillman, *supra* note 24, at 898-99; 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED BY ENGLAND AND AMERICA § 469, at 449-50 (14th ed. 1918) (confirmation of agreement made under duress does not bar relief if the victim is "still acting under the pressure of the original transaction.").

<sup>55</sup> See John Dalzell, *Duress By Economic Pressure I*, 20 N.C.L. REV. 237, 238-40 (1942).

<sup>56</sup> See generally SISSELA BOK, LYING 114-48 (1979). See also *id.* at 43: "If to use force in self-defense or in defending those at risk of murder is right, why then should a lie in self-defense be ruled out?"

<sup>57</sup> Narasimhan, *supra* note 1, at 80.

<sup>58</sup> *Id.* at 82 n.105.

<sup>59</sup> *Id.* at 81-82 n.105; see also *id.* at 79; OLIVER WENDELL HOLMES, JR. THE COMMON LAW 235-36 (M. Howe ed. 1963) ("[T]he scope of a promisor's obligation must be measured not only by his promise, but also by the remedies for its breach."). Professor Narasimhan terms the argument that a promise is more than this "provocative" but "misplaced" in a discussion of contract modification. Narasimhan, *supra* note 1, at 81-82 n.105. But what could be more important in an analysis of contract modification than the nature of the promises the parties seek to adjust?

<sup>60</sup> Narasimhan, *supra* note 1, at 79.

<sup>61</sup> Professor Narasimhan even refers to self-help as an "evil." *Id.* at 93.

<sup>62</sup> See, e.g., John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 279 (1972) ("Common law courts . . . are concerned that the damage doctrines not encourage default.") (emphasis in original).

<sup>63</sup> See, e.g., Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); E. Allan Farnsworth, *Legal Remedies for Breach of*

"jealous" common law judges, chancellors in equity historically intervened only in those rare cases where the common law remedy was inadequate.<sup>64</sup> The preference could also follow from the need to ensure jury trial rights, constitutionally guaranteed only in cases "at law."<sup>65</sup> Alternatively, courts may wish to minimize the exercise of their coercive authority, which may require drastic enforcement procedures such as contempt, which, in turn, focuses concern on the legitimacy of courts.<sup>66</sup> Or, as a matter of fairness, courts may seek to protect inadvertent breachers from the pitfalls of specific performance, and, because of the difficulties of sorting out aggravated from innocent breach, treat both alike. Although these conjectures about the reasons for contract law's preference for damages hardly resolve the matter, they certainly suggest that more is at work here than an effort to ratify purposeful contract breach.

Furthermore, even if contracting parties should know the rules of contract damages and these rules appear to permit breach, they should also comprehend the law of contract modification, which entitles a buyer to contest a bad faith modification. They therefore should know that a seller's promise includes the obligation to refrain from threatening a breach simply to extract additional compensation from the buyer.<sup>67</sup> In short, the seller's good faith in choosing not to perform is an issue even if, in the abstract, the seller has the "right" to breach.<sup>68</sup>

Moreover, the parties should also be aware of myriad additional rules of contract law that encourage performance and deter wrongful breach.<sup>69</sup> These rules should surprise no one. People keep their

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*Contract*, 70 COLUM. L. REV. 1145 (1970); Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52 (1936).

<sup>64</sup> DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 61 (1973).

<sup>65</sup> U.S. CONST. amend. VII. See D. DOBBS, *supra* note 64, at 69.

<sup>66</sup> D. DOBBS, *supra* note 64, at 67.

<sup>67</sup> In another context, Professor Narasimhan simply assumes that the parties comprehend remedial law but not modification law. Narasimhan, *supra* note 1, at 83 n.111.

<sup>68</sup> See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (express power to terminate contract modified by a duty of good faith); *Ross Sys. v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 173 A.2d 258 (1961) (threat to terminate franchise agreement constitutes duress despite the right to terminate); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533, 342 N.Y.2d 22 (1971) (threat not to perform improper despite "right to breach"). See also E. ALLAN FARNSWORTH, CONTRACTS 261 (1982) ("a threat may be improper if it amounts to a breach of [the duty of good faith]").

<sup>69</sup> See, e.g., U.C.C. § 1-203 (obligation of good faith performance); *id.* § 2-609 comment 1 (purpose of contract is to secure performance); RESTATEMENT OF CONTRACTS § 275(e) (willfulness a factor in determining material breach); RESTATEMENT (SECOND) OF CONTRACTS § 241(e) (good faith and fair dealing a factor in determining material breach); *id.* § 205 (general obligation of good faith); *id.* § 261 and comment d (fault a factor in impracticability claim); *id.* § 352 and comment a (less certainty in proof of damages required when a breach is willful); *id.* § 374 and comment b (breaching party's

promises and others rely on them, not only because of expectations shaped by contract rules, but also because of social, business, and ethical norms dictating that one should keep a promise.<sup>70</sup> To encourage contracting and reliance on contracts, our law must reflect and support these norms, not contradict them.<sup>71</sup> The totality of current contract doctrine reveals that a party's promise is therefore much more than a mere obligation to perform or to breach and pay damages.<sup>72</sup>

The assumption that parties "know or should know" the rules of contract remedies at the time of contracting, and the assertion that a buyer has therefore not paid for specific performance, are also highly suspect.<sup>73</sup> Studies of contracting cultures reveal the limited efficacy of contract rules in governing many business relationships.<sup>74</sup> Business people recurrently fail to plan and draft their agreements with precision,<sup>75</sup> and fail to call in lawyers.<sup>76</sup> "Business cultures" rather than legal norms often govern the parties' relations.<sup>77</sup> When a buyer and seller contract against this background,

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restitution measure will not exceed the less generous measure of the other's increase in wealth); *id.* § 251 and comment a ("a contract 'imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired'" (quoting U.C.C. § 2-609(1))). See also Robert A. Hillman, *Keeping The Deal Together After Material Breach—Common Law Mitigation Rules, The UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 555, 559-60 (1976) (courts "punish" contract breakers by failing to require the injured party to deal further with them); Patricia H. Marschall, "Wilfulness": A Crucial Factor in Choosing Remedies for Breach of Contract, 24 ARIZ. L. REV. 733 (1982).

<sup>70</sup> See, e.g., Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 652 (1988); ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 47-48 (1987).

<sup>71</sup> See LON L. FULLER, *THE MORALITY OF LAW* 28 (rev. ed. 1969).

<sup>72</sup> Fundamental fairness also dictates that we promote performance, not approve of breach, because people rely on promises. In Professor Narasimhan's problem, for example, B relied on S's performance in order to satisfy B's own major customer, and will suffer significant but potentially uncompensable damages if S breaches.

The theory of promissory estoppel is also based on the fairness principle that people rely on promises, not on promises qualified by the undercompensatory nature of legal remedies. See RESTATEMENT (SECOND) OF CONTRACTS § 90.

<sup>73</sup> The argument that breaking a promise simply to improve one's position is not immoral and the assertion that specific performance unjustly enriches the buyer are therefore highly doubtful.

<sup>74</sup> See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 5 (1980); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See generally Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988).

<sup>75</sup> Stewart Macaulay, *Contract Law and Contract Research (Part II)*, 20 J. LEGAL EDUC. 460, 461 (1968); see also Ian R. Macneil, *Contracts and the Big Wide World*, 2 CORNELL L.F. 12 (Spring 1975): ("[Modern contractual] relations are so complex that no one with any sense believes that complete and binding planning at any one time is possible; everyone of any perception realizes that the relation will grow and change with events occurring in a largely unforeseeable future . . .").

<sup>76</sup> Macaulay, *supra* note 75, at 461-62.

<sup>77</sup> Stewart Macaulay, *An Empirical View of Contract*, 1984 WIS. L. REV. 465, 467.

it is highly unlikely that the price reflects the potential for specific performance.<sup>78</sup>

Moreover, even when the parties' contract is more formal, they may be unable to calculate the probability of specific performance and account for it in the price because the remedy is too amorphous. As already noted, Code section 2-716 provides for specific performance "where goods are unique or in other proper circumstances."<sup>79</sup> The rule hardly offers a clear test of when the remedy applies. When are goods "unique"? What are "other proper circumstances?"<sup>80</sup> At best, we know that when there are ready market substitutes a court will balk at specific performance, and when the goods are completely unavailable on the market specific performance is likely.<sup>81</sup> But this "refinement" of the specific performance test hardly clarifies the issue for many parties at the contract formation stage, who must predict future market activity and who must assume that their contract will fall within the extremes of the specific performance test.<sup>82</sup> In fact, a seller's subsequent request for a price increase, which triggers the buyer's self-help specific performance strategy, will frequently be based on unanticipated market conditions not reflected in the parties' pre-contract bargaining.

For all of these reasons, contract's remedial preference for damages does not insulate a seller's breach decision from charges of unlawfulness, immorality, or unfairness. Nor does self-help specific performance unjustly enrich the buyer. In Professor Narasimhan's problem, then, we should be content even if the law precluded specific performance and overturned the modification. After all, S, without justification, demanded an unfair price increase.<sup>83</sup> B faced delay, the loss of its major customer, and potential undercompensa-

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<sup>78</sup> Professor Narasimhan acknowledges that to assume parties factor legal remedies into the contract price may be counterfactual. Narasimhan, *supra* note 1, at 83 n.111; see also Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CALIF. L. REV. 1123, 1129 (1986) ("[I]ncomplete contracting should be the fundamental premise about the contracting process."). Of course, a buyer may pay indirectly for the potential specific performance remedy in some circumstances, such as when the price reflects the goods' uniqueness.

<sup>79</sup> See *supra* note 17 and accompanying text.

<sup>80</sup> But see Narasimhan, *supra* note 1, at 85 n.120: "The threshold requirements for receiving specific performance are governed by well-defined rules."

<sup>81</sup> See, e.g., *In re Tennecomp Sys., Inc. v. Public Serv. Co.*, 12 Bankr. 729 (E.D. Tenn. 1981); *Pierce-Odom, Inc. v. Evenson*, 5 Ark. App. 67, 632 S.W.2d 247 (1982); *Sedmak v. Charlie's Chevrolet, Inc.*, 622 S.W.2d 694 (Mo. Ct. App. 1981); see also U.C.C. § 2-716 comment 2: "[I]nability to cover is strong evidence of 'other proper circumstances'"; Narasimhan, *supra* note 1, at 69 n.39.

<sup>82</sup> Because unanticipated circumstances are inevitable in our complex technological society, even sophisticated business people cannot always predict the future with accuracy. See Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 627-28 (1983).

<sup>83</sup> Narasimhan, *supra* note 1, at 77.



tion if it did not agree to the price increase. We should not construct rules that encourage S's conduct.

### III

#### THE EFFECTIVENESS OF MODIFICATION LAW TO DETER SELLER OPPORTUNISM

Let us now assume, contrary to Parts I and II, that current law invites buyer self-help specific performance and that such a strategy is troublesome. Even if a seller's potential for misbehavior greatly exceeds the buyer's, if modification law is ineffective to combat seller opportunism and fuels the buyer's, then Professor Narasimhan's concerns still have merit. In this section, however, I assert that, despite Professor Narasimhan's apprehensions, modification law helps deter seller opportunism and is not deficient on efficiency or other grounds. We therefore should preserve current modification law—perhaps even strengthen it—even if a buyer could improve its remedial entitlement by achieving self-help specific performance.

In asserting her view of the inadequacy of existing modification law to police sellers,<sup>84</sup> Professor Narasimhan fails to emphasize that in reality courts underutilize the good faith policing tool.<sup>85</sup> Such an approach conflicts with her perception that the legal standard for overturning modifications is relatively generous,<sup>86</sup> and simply calls for enhanced scrutiny of a seller's conduct. Instead, she contends that modification law is impractical to police sellers because they will avoid modifying and will turn to other methods of achieving their ends.<sup>87</sup> She also claims that modification law is inefficient.<sup>88</sup> I now turn to these arguments.

Professor Narasimhan surmises that self-help specific performance is more costly to a seller than liability for damages.<sup>89</sup> Accordingly, she claims that if buyers resort increasingly to self-help specific performance a seller might not offer a buyer the option of modifying the price.<sup>90</sup> Instead, a seller "might create an 'ex-

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84 "Self-help specific performance cannot generally be justified as a corrective for [seller] opportunism." *Id.* at 80.

85 *See supra* note 35 and accompanying text.

86 *See supra* note 29 and accompanying text.

87 *See infra* notes 89-95 and accompanying text.

88 *See infra* note 99 and accompanying text.

89 Narasimhan, *supra* note 1, at 80.

90 *Id.* at 81. Professor Narasimhan also argues that the parties will encounter difficulties attempting to adjust the initial contract price to reflect the cost of self-help specific performance. The buyer will not pay for the self-help remedy because the seller will not offer an adjustment if it knows that the buyer need not honor the modification. *Id.* at 80-81. *But see supra* notes 73-78 and accompanying text.

change' ”<sup>91</sup> or even breach.<sup>92</sup> By the former Professor Narasimhan means that a seller will offer a buyer additional consideration for the buyer's agreement to increase the price.<sup>93</sup> This troubles Professor Narasimhan because she believes that such “exchanges” would be difficult to police for seller bad faith.<sup>94</sup> She offers little evidence, however, that policing an “exchange” would be any more difficult than policing a unilateral price modification.<sup>95</sup>

I am also not convinced that sellers have formulated or will create strategies to avoid a unilateral price modification, even if existing law relatively generously entitles a buyer to overturn one. Despite my insistence that seller opportunism is potentially a serious problem, it is not inconsistent to reason that most sellers will believe that they are rightfully negotiating for a fair adjustment to reflect market or other conditions. Few sellers would admit even to themselves the possibility that their behavior is wrongful and likely to be overturned. Moreover, most sellers will perceive that their buyers, concerned about potential non-compensable costs of contesting a modification, such as litigation expenses, a soured relationship, loss of good will and damage to reputation, and even anxious about the success of their efforts to contest, will be reluctant to challenge an adjustment. A seller consequently will be delighted with the buyer's “willingness” to adjust.

In addition, breach may rarely be a viable choice for a seller<sup>96</sup> because of the fear of loss of reputation, of goodwill and even of liability for the breach. As to the latter, on the whole Professor Narasimhan correctly paints a bleak picture of our remedies system's potential to make an aggrieved party whole.<sup>97</sup> Nevertheless, while generally under-compensatory, contract remedies may be sufficiently uncertain to make a seller unwilling to risk a breach. The

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<sup>91</sup> *Id.* at 80 n.99 and 83 n.110.

<sup>92</sup> Professor Narasimhan assumes that sellers will prefer the former. *See id.* at 84 n.115. *But see* Thornton E. Robison, *Enforcing Extorted Modifications*, 68 IOWA L. REV. 699 (1983).

<sup>93</sup> Narasimhan, *supra* note 1, at 84 n.115.

<sup>94</sup> *Id.* at 73 n.60.

<sup>95</sup> Professor Narasimhan states that “the policing of the fairness of a new exchange of obligations is complicated by the fact that the court has no benchmark for the value the parties would have set upon the exchanged, modified performances absent opportunism. . . . In theory, in the case of a unilateral modification, the court has a benchmark, the original unmodified price.” *Id.* But she acknowledges that the original price is no benchmark at all when circumstances change. *Id.* Moreover, most indices of coercion, such as seller threats and the buyer's absence of choice, will exist regardless of whether a coerced modification is unilateral. In addition, she ignores the fact that courts regularly police the fairness of an exchange under the guises of public policy, unconscionability, and even inequality of the exchange.

<sup>96</sup> *But see id.* at 81, 83-84; Robison, *supra* note 92.

<sup>97</sup> Narasimhan, *supra* note 1, at 65-67.

seller *may* be tied up in costly and time-consuming litigation about the extent of the damages; the buyer *may* recover large consequential damages; the buyer *may* be entitled to specific performance. In short, just as the buyer confronts significant uncertainties at the time the seller seeks a modification, the seller cannot assume that it will improve its position by “creating an exchange” or breaching rather than by agreeing to a modification.<sup>98</sup>

Both Professor Narasimhan and I thus speculate about the likely conduct of buyers and sellers under current modification law. Nevertheless, before we diminish the potential of that law to police sellers in order to deal with the less worrisome problem of buyer opportunism, we should require more concrete evidence of modification law’s current lack of utility.

Professor Narasimhan also asserts that current modification law is undesirable because it is inefficient: A buyer, in deciding to pursue self-help, can ignore the seller’s costs of performing the contract.<sup>99</sup> Potentially, these costs could outweigh the buyer’s gains from self-help specific performance. But modification law *does* require the buyer to consider the seller’s costs. The self-help strategy can succeed only if the buyer can defeat the modification. Under current law, the buyer’s gains may well exceed the seller’s costs of performing in precisely such cases.<sup>100</sup> The buyer faces market scarcity and serious uncompensable reliance losses if the seller does not perform. On the other hand, the seller’s failure to muster a “legitimate commercial reason” for seeking a modification suggests that the seller’s motive was not based on substantial cost increases.<sup>101</sup> Conversely, if excessive costs would excuse the seller from performance on impracticability or other grounds, a price modification would be enforceable despite the seller’s “threat” not to perform.<sup>102</sup> Modification law therefore thwarts the self-help strategy in precisely those cases where the seller’s costs of performing are likely to exceed the buyer’s gains.

Even if modification law is inefficient, Professor Narasimhan admits that remedial law’s preference for damages over specific performance may be inefficient as well.<sup>103</sup> Efficiency reasons are there-

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<sup>98</sup> “S will only prefer breach if the cost of performance, including the opportunity cost, exceeds the damage award he would be required to pay.” *Id.* at 89.

<sup>99</sup> *Id.* at 81.

<sup>100</sup> *Id.* at 88.

<sup>101</sup> See *supra* notes 38-39 and accompanying text.

<sup>102</sup> See Hillman, *supra* note 24, at 887-94.

<sup>103</sup> Professor Narasimhan sets forth the debate concerning whether specific performance or damages is efficient and concludes that the debate is inconclusive. Narasimhan, *supra* note 1, at 77-79; see also *id.* at 81, 82 n.105, 94.

fore unhelpful in deciding whether to permit self-help specific performance.

Despite several general statements that remedial law deserves an exalted position over modification law,<sup>104</sup> Professor Narasimhan offers little in the way of additional explanation for why remedial law's preference for damages should preclude self-help specific performance.<sup>105</sup> In fact, assuming consistency in approach is a virtue here,<sup>106</sup> current remedial law, and not modification law, appears to present the anomaly.<sup>107</sup> Our choice is either to thwart the buyer's self-help remedy by restructuring modification law to defeat a buyer's claim of seller bad faith, or to diminish the effect of a seller's wrongful coercion by altering remedial law so that specific performance is more readily available.<sup>108</sup> Because the problem of seller opportunism dwarfs buyer opportunism, because current modification law helps deter seller misconduct<sup>109</sup> and existing contract remedial law fosters it,<sup>110</sup> and because the superior remedy for contract breach remains uncertain,<sup>111</sup> the appropriate course is to police contract modifications with renewed vigor, unconcerned by whether the buyer achieves specific performance indirectly. Moreover, we should call for additional investigation into whether the law of remedies should be reformed.<sup>112</sup>

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<sup>104</sup> "Self-help enforcement measures must be integrated into the general fabric of contract remedy." *Id.* at 63; *see also id.* at 80 and 82 n.105.

<sup>105</sup> Professor Narasimhan acknowledges that modification law could be utilized as a "back door" to correct remedial deficiencies. *Id.* at 82 n.105. But how do we know that modification law is the back door and remedial law is the front door? If remedial law should reflect substantive rights and modification law preserves a self-help route to specific performance, then, perhaps, remedial law should reflect modification law's position. Professor Narasimhan also argues that private action should be consonant with the goals of contract law. *Id.* at 81-82. But does current remedial law or current modification law better reflect these goals?

<sup>106</sup> Even this is debatable. *See id.* at 63 n.11 (discussing whether private action should be independent of state control).

<sup>107</sup> At times, Professor Narasimhan seems to concede as much. *See, e.g., id.* at 81 n.101 (acknowledging the possibility that "at least where contract law fails to prefer one remedy over another, remedies should be chosen to minimize opportunism"). With this goal in mind, specific performance might be appropriate in transactions involving reliance on the relation. *See also id.* at 84 ("In contracts involving non-fungible goods or services, the only way to deter promisor [seller] opportunism is to strictly enforce the specific performance remedy.").

<sup>108</sup> The latter may already be part of the law of remedies. *See supra* notes 19 and 40 and accompanying text.

<sup>109</sup> *See supra* notes 38-39, 84-98 and accompanying text. Of course, as I have argued, few courts actually overturn modifications. *See supra* notes 34-37 and accompanying text. But the problem of seller extortion suggests that we should strengthen modification law's policing function, not diminish it.

<sup>110</sup> *See supra* note 38 and accompanying text.

<sup>111</sup> *See supra* note 103 and accompanying text.

<sup>112</sup> In fact, recall that one important reason offered by Professor Narasimhan for why B may not receive specific performance in her sales problem is not even related to

## CONCLUSION

According to Professor Narasimhan, a court should not overturn a modification formed after a seller refuses to perform without an increase in price or other consideration unless the buyer was entitled to specific performance of the original contract or specific performance, although unavailable, was the "preferred" remedy.<sup>113</sup> Professor Narasimhan would therefore deflect the analysis away from seller bad faith into the murky environs of remedial law. She would do this so that the buyer could not improve its position by agreeing to a modification and later successfully contesting it.<sup>114</sup>

I do not believe that buyer opportunism through self-help specific performance is a significant problem. On the other hand, investments by the buyer in the contract and inadequate remedies for the seller's breach create enticing incentives for seller coercion. I therefore disfavor Professor Narasimhan's suggestions. Moreover, although Professor Narasimhan believes that current modification law fosters buyer opportunism with "no gains for the goals of contract enforcement,"<sup>115</sup> I assert that existing law appropriately focuses on enforcing freely made agreements and deterring extorted ones.<sup>116</sup> Achieving these goals requires policing seller bad faith

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some important remedial policy goal, but is based on the delay in our courts. "Because substitute parts were probably available on the market before the completion of litigation," B cannot show that damages are inadequate. Narasimhan, *supra* note 1, at 69. Professor Narasimhan, in effect, urges us to compound the problem of judicial delay by tying a buyer's rights in the modification context to tardy remedial law. Instead, I would argue that Professor Narasimhan's sales problem best fits within the second category of cases in which she permits self-help: where specific performance is the "appropriate" remedy but may be unavailable because of the administrative inadequacies of courts. *Id.* at 82, 86-89.

<sup>113</sup> See *supra* note 8 and accompanying text.

<sup>114</sup> A significant effect on current modification analysis would be that contract damages, which Professor Narasimhan concedes to be woefully inadequate to make a buyer whole, would be considered a reasonable alternative to agreeing to the seller's modification so that the buyer could not successfully defeat the modification on the basis of the seller's coercion. Narasimhan, *supra* note 1, at 95.

<sup>115</sup> *Id.*

<sup>116</sup> U.C.C. § 2-209 comment 1; *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181 (W.D. Tenn. 1974).

Although my comments are limited to buyer self-help specific performance, I believe that other types of contracts require a similar analysis. For example, I am not concerned about self-help specific performance in either employment or construction contracts. First, parties to these contracts will suffer from many of the same informational deficiencies and legal hurdles addressed in Part I. In addition, even Professor Narasimhan agrees that we should not be troubled when threatened employers or landowners achieve self-help specific performance, even though they are disentitled to specific performance for reasons of judicial discretion. Professor Narasimhan correctly reasons that these parties' contracting counterparts have the "greatest opportunity for opportunistic behavior." Narasimhan, *supra* note 1, at 88; see also *id.* at 93, 94. In fact, Professor Narasimhan also admits that modifications of long-term contracts "should be unaffected" by her analysis because such adjustments should be enforceable under the

even if this creates the possibility that a buyer could receive a performance that the remedial system, because of its inadequacies, would not provide.

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“unexpected circumstances” test. *Id.* at 71 n.49. The vast array of cases immune from concern about self-help specific performance bears out my suspicion that it is no problem at all.